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## Legal Education and the Reproduction of Hierarchy: A Polemic Against the System

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LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM. By *Duncan Kennedy*. Cambridge, Massachusetts: Afar. 1983. Pp. ii, 125. Paper, \$2.95.

While many law students and lawyers complain about law school and law firms,<sup>1</sup> few try to do anything about them. Conditioned to passivity and ideologically incapable of imagining sweeping change, each new generation entering the bar attempts no more than incremental reform of the "system." According to Harvard Law School Professor Duncan Kennedy, a leader in the Critical Legal Studies movement, law school does its part to ensure the reproduction of the system by providing subtle but powerful "ideological training for willing service in the hierarchies of the corporate welfare state" (p. 1).<sup>2</sup> Kennedy's polemic argues that American legal education, ostensibly non-ideological, perpetuates hierarchy by justifying it as the result of a supposedly logical and neutral process called "legal reasoning." Kennedy acknowledges that there is a particular set of "legal reasoning" skills,<sup>3</sup> but denies that there can be a "correct legal solution" distinct from a "correct ethical and political solution" (p. 20).

The first-year law student learns time and again that value-neutral, logical "legal reasoning" leads to liberal capitalist results. The student concludes that "[t]here are good reasons for the awful result, when you take a legal and logical view, as opposed to a knee-jerk passionate view" (p. 7). As a result, the student who comes to law school a committed leftist learns to put away her "childish" emotions and to accept the capitalist results that follow from "legal reasoning" (pp. 12-13).

By focusing heavily on teaching particular rules and applications, professors are able to skirt the policy assumptions upon which those rules are based. "[F]undamental questioning . . . is relegated to the periphery of history or philosophy" (p. 21). Professors pretend that

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1. See, e.g., Stewart, *Third and Fourth Year Associates Rate Their Firms*, AM. LAWYER, Mar. 1982, at 37, 43 (quoting an associate at Weil, Gotshal & Manges of New York City):

I now realize that associates are commodities, readily used and, when necessary, replaced. The adage that big firms give better training now strikes me as a myth. I am somewhat disappointed, almost bitter that my personal development as an attorney has been stunted and that I am held in the same regard as any other appliance; namely, use him until we either don't need him any more or until he burns out.

2. Some students and associates are of course more willing than others. Many believe what they are told, and "behave in ways that fulfill the prophecies the system makes." P. ii. Others may just dissociate their professional and "private" selves. Pp. 73-74.

3. Including, among others, remembering rules organized into categorical systems, spotting issues, arguing for a broad or narrow holding of a case, and making pro and con policy arguments. P. 15.

certain mushy fields of law (such as environmental law) involve policy considerations, while other fields (such as contracts) do not. In fact, argues Kennedy, all law is intensely ideological and policy-oriented. Because professors almost never discuss the relationship among the first-year subjects, the students are unable to develop a unifying vision of the law, and can thus never imagine radical change in its entire structure.<sup>4</sup>

Legal reasoning itself is taught obliquely (p. 16). Professors never explain exactly what students should be trying to learn and offer little feedback. By using the case method to teach legal reasoning so indirectly, professors mystify legal reasoning, thus serving a variety of hierarchical interests. The mystification justifies the law school faculty's position at the top of the legal hierarchy, justifies the six-figure salaries students come to expect for work that is "mainly elementary or mindless" (p. 40) and justifies the legal profession's position near the top of America's social structure.

The preparation for hierarchy, contends Kennedy, pervades the law school. "[O]ne cannot grasp the political significance of legal education without understanding that the future is present within every moment of a student's experience" (p. 44). The Socratic method produces a "Kafka-like riddle state" (p. 3), in which the student learns to stifle his emotions, and to smile graciously when martinets and curmudgeons win their points by pronouncing that the absurd is dispositive.<sup>5</sup> By interacting with professors and by watching professors interact with other people (such as law school secretaries), students learn how to "show the appropriate form of deference to those above [them] and condescension to those below" (p. 31). In peer relations, the student acquires the combination of "camaraderie and distrust" that will mark his relations with his law firm age cohort (p. 65). And, of course, law school is also finishing school, where students learn the appropriate styles and tastes for their rung on the ladder (p. 38).

4. As Erwin Griswold observed about the same phenomena:

But again and again we stress logic as the ultimate objective, though we may be rather unaware that we are doing so. We encourage imagination — in small ways, and perhaps in analogical reasoning. But do we encourage imagination in the broad sense? Do we encourage our students to devise new premises, to start out on whole new lines of reasoning, to come up with new solutions?

Griswold, *Intellect and Spirit*, 81 HARV. L. REV. 292, 300-01 (1967) (Address at Sesquicentennial Celebration, Harvard Law School, Sept. 23, 1967).

For details on Kennedy's approach in his own Contracts class, where he aims to "debunk claims to certainty and rationality in the law," and to move the class into "a critique of the fundamental economic structures sustained by the rules of property, contracts, and torts," see Kelso, *The 1981 AALS Conference on Teaching Contracts: A Summary and Appraisal*, 32 J. LEGAL EDUC. 616, 626-629 (1982).

5. An example is the conclusion that expectation damages represent the will of the parties. P. 18. Similarly, professors pronounce policy arguments (such as the need for business certainty) as conclusive in some cases and ignore the same arguments when they want another case to turn out differently. P. 18.

Kennedy recognizes that law school's hierarchies are analogous to the hierarchies of the legal profession in particular and American society in general: "Individuals are to firms as firms are to the bar as the bar is to society" (p. 43). As he explains, "the ideology of legal hierarchy is no more than a specialized application of the general meritocratic ideology of American society" (p. 84). Kennedy despises the American capitalist hierarchy partly because one's position in it correlates mostly with one's position at birth (p. 38); but Kennedy's basic position is that, regardless of any benefits to society, and regardless of any relation to merit, hierarchy is in itself a "social perversion" (p. 79).

Recognizing that radical change in America is unrealistic as a short-term goal, Kennedy offers his student readers some suggestions for taking the first steps to making law school more humane: Stand up to authoritarian teachers, lobby for a less corporate curriculum and placement process, and demand a strong, political legal services clinic (p. 112).<sup>6</sup>

Kennedy's long-term goals are considerably more ambitious. His law school would put less energy into circular Socratic dialogues and more into direct skills teaching (p. 28), so that graduates would not need to seek training in corporate apprenticeships (p. 30). Instead of ranking students, Kennedy's utopian law school would work at "level[ing] up" students (pp. 27-28) and disadvantaged professors (p. 123). Kennedy contends that shifting resources from the more to the less advantaged would not lower the abilities of those at the top (p. 53).<sup>7</sup> At the Kennedy law school, everyone would be paid the same salary. Professors would spend one month a year doing non-professorial work, and every other employee would participate in "some version of the faculty's unscheduled work experience" (p. 123).

Kennedy's impressionistic, polemical style is long on general theory but short on specific evidence. While Kennedy did not aim to write a treatise, his broad assertions will not convince readers who are not already somewhat sympathetic to his argument.<sup>8</sup> His over-generalizations sometimes give the impression that Professor Kings-

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6. Kennedy notes that most professors denigrate legal services work as less interesting than corporate work. He replies that "[l]egal services practice . . . is far more intellectually stimulating and demanding, even with a high case load, than most of what corporate lawyers do. It is also more fun." P. 29.

7. The belief that redistribution will benefit everyone seems to be a Panglossian effort to avoid facing the costs of the proposed system.

8. See Levinson, Book Review, 96 HARV. L. REV. 1466, 1486 (1983) (criticizing "Kennedy's adoption of what might be described as argument by charismatic authority, by which it is unnecessary to support one's assertions with evidence beyond personal declaration . . .").

Kennedy recognizes that his attack on the law school is not a well-documented brief:

To the committed empiricist, the pages which follow will seem no more credible than a child's tortured dream. Yet even the committed empiricist must recognize that for the time being at least there are areas inaccessible to him, areas where what passes for knowledge must be no more than a network of intuitions and theories dimly grasped. . . . It is

field is Dean of every law school in the country. Despite Kennedy's assertions, students do not consistently prefer more "rigorous" traditional professors to those who are more policy-oriented (pp. 4-5).<sup>9</sup> Nor is the curriculum as piggishly capitalistic as Kennedy claims. Although contracts students learn the lesson of *Peevyhouse v. Garland Coal & Mining Co.*,<sup>10</sup> where a corporation succeeds in breaking its promise to restore a farm family's strip-mined land (pp. 6-7), they also learn about *Emery v. Caledonia Sand & Gravel Co.*,<sup>11</sup> where the farm family wins on almost identical facts.<sup>12</sup> Kennedy's exaggeration of the capitalist orientation of the curriculum perhaps results from his attempt to explain to himself why so many law students reject the policies he sees as so clearly correct.

For the most part, Kennedy does not let his radicalism rot in the intellectual crypt of pedantic Marxism. He recognizes that the causes of hierarchy are far too complex to be explained as merely determined products of a capitalist socio-economic structure. But he does occasionally let himself lapse into conspiracy theory, as when he claims that one way students are made to toe the line "is to arrange things so that almost all students get good jobs, but most students get their good job through twenty interviews yielding only two offers" (p. 70). One doubts that anyone has deliberately "arranged" the interviewing process at all; in any case, law firms seem to dislike the superficiality and waste of the process as much as the students do.

While many of Kennedy's arguments are quite valid, his claim that there can be no truly legitimate view but his own is offensive. Although Kennedy is probably right in saying that corporate lawyers are overpaid, his announcement that they are rewarded beyond their "objective merit" (p. 41) proves too much. How can merit be objective?<sup>13</sup> Similarly, the conclusion that everyone has an "objective interest" in liberation from hierarchy (p. 97) is "neutrally" derived from Kennedy's own prior policy choices — choices that derive no

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perhaps because of this elusive quality of the subject that I find myself unable to approach it in any other tone than that of moral exhortation.

Kennedy, *How the Law School Fails: A Polemic*, YALE REV. L. & SOC. ACTION, Spring 1970, at 71, 71.

9. While some popular professors at the University of Michigan Law School, such as J.J. White, are rigorous and arguably non-policy-oriented, other equally popular professors, such as Yale Kamisar, focus heavily on policy. And professors like Francis Allen make one question Kennedy's observation that the more "rigorous" and "traditional" professors shun policy discussion.

10. 382 P.2d 109 (Okla. 1963).

11. 117 N.H. 441, 374 A.2d 929 (1977).

12. See D. VERNON, CONTRACTS: THEORY AND PRACTICE 6-73 to 6-90 (1980) (juxtaposing *Peevyhouse* and *Emery*).

13. In fact, the point about objectivity is undermined by Kennedy's own observation (in another context) that "there is no 'natural' value for anyone's labor." P. 92.

more from objective analysis than do the free-market policy choices of other professors. And by stating that "[t]he denial of hierarchy is false consciousness" (p. 77), Kennedy makes a claim to true enlightenment as self-righteous and closed-minded as any capitalist ever made.<sup>14</sup>

Most readers will get off Kennedy's "existential-Marxist, anarcho-syndicalist, modernist" (p. 84) bus before the end of the trip. But one need not accept all of Kennedy's claims in order to profit from *Legal Education and the Reproduction of Hierarchy*. In spite of a tendency to overstatement, Kennedy has written much that is true about law school's subtle ideological indoctrination. Students can learn more from a few hours with this book than they can by spending a week with the Restatements.

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14. Cf. I. BALBUS, *MARXISM AND DOMINATION* 56 (1982) (emphasis in original):

If we did not assume that there were compelling reasons for the proletariat to define *its* interest as the interest in transcending capitalist alienation, then there would be no warrant for characterizing its failure to so define its interests as false, and we should rather perhaps conclude that Marx's theory is false. The entire problematic of false consciousness is based on a search for the causes of an absence. That this absence should be a problem worth pursuing, however, rather than a nonproblem, assumes that it is an absence of a presence that is reasonable to expect. But this is precisely what Marx has been unable to demonstrate. This suggests, once again, that it is Marx's theory, rather than working-class consciousness, that must be called into question.

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